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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RONNIE DAVE LEWIS, Defendant and Appellant.	B285955 (Los Angeles County Super. Ct. No. BA444894)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Ronnie Dave Lewis (Lewis) guilty of pimping and of the human trafficking of minors. On appeal, Lewis contends that the trial court erred by finding a victim/witness unavailable and permitting her preliminary hearing testimony to be introduced, that there was insufficient evidence of pimping, that there were prejudicial instructional errors, and that the trial court abused its discretion by denying his *Romero*[1] motion. We reject these contentions and affirm the judgment.

PROCEDURAL AND FACTUAL BACKGROUND

I. Lewis is charged with sex offenses

A consolidated information charged Lewis with the following offenses: pimping A.D. (Pen. Code,[2] § 266h; count 1), human trafficking of a minor, L.M., for a commercial sex act (§ 236.1, subd. (c)(1); count 2), attempted oral copulation of a person under 18, M.S. (§§ 664, 288a, subd. (b)(1); count 3), possession of a firearm by a felon (§ 29800, subd. (a)(1); count 4), human trafficking of a minor, D.C., for a commercial sex act (§ 236.1, subd. (c)(1); count 5), human trafficking a minor, T.E., for a commercial sex act (§ 236.1, subd. (c)(1); count 6), human trafficking of a minor, A.H., for a commercial sex act (§ 236.1, subd. (c)(1); count 7), and dissuading a witness, L.M., by force or threat (§ 136.1, subd. (c)(1); count 8). The information also alleged that Lewis had two prior convictions within the meaning of the "Three Strikes" law.

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[1] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

[2] All further statutory references are to the Penal Code unless otherwise indicated.

A jury found Lewis guilty only of counts 1, 2, and 6, and the trial court found that he had suffered the prior convictions. On October 5, 2017, after denying Lewis's motion to strike the prior convictions, the trial court sentenced Lewis to the midterm of four years doubled to eight years under the Three Strikes law on count 1. The trial court also sentenced him to two consecutive 25 years to life terms on counts 2 and 6.

Because the jury found Lewis guilty of only counts 1, 2, and 6, we next summarize evidence relevant to those counts and to the issues on appeal.

II. A.D.

A.D. testified that she used to be a "street walker" who exchanged sexual services for money. In her words, she "sold pussy." When A.D. was 17, Lewis, whom she called Meechie, was her pimp. She chose him because "[h]e didn't run us strong or a hard program," and he didn't hit people. A.D. had "Meechie" tattooed on her thigh. Lewis "protect[ed]" A.D. and drove her around. He also provided her with condoms. A.D. worked for Lewis every day, twice a day (a day and a night shift), and she gave him money she made from her commercial sex work, although she kept some money for herself. With the money A.D. and the other women working for Lewis made, they bought him a car and a gun.

A.D. and Lewis argued, so she left. However, he texted her, asking her to work for him again.

III. L.M.

L.M. began working as a prostitute when she was 14. She met Lewis in October 2015, when she was 16, and he became her pimp. L.M. would have "dates," where she exchanged sexual

services for money, which she gave to Lewis. L.M. worked for Lewis until January 2016. During that time, she lived with him, and they had sex. Like A.D., L.M. had Meechie tattooed on her thigh. The tattoo was Lewis's claim of ownership to L.M.

L.M. also testified that A.D. worked for Lewis. Sometimes, Lewis would take L.M. and A.D. to work on the same "track" (an area where commercial sex activity occurs) and pick them up when they were done working.

IV. T.E.

In 2015, when T.E. was about 16 years old, she worked for Lewis, who was her pimp. T.E. exchanged sexual services for money. Because Lewis was her pimp, T.E. gave Lewis all the money she made from her commercial sex work.

T.E. knew that A.D. also worked for Lewis.

DISCUSSION

I. Unavailability of L.M.

L.M., the victim in count 2, testified at the preliminary hearing, but the prosecution was unable to secure her attendance at trial. The trial court therefore held a due diligence hearing on July 17, 2017 after which it found that L.M. was unavailable and that her preliminary hearing testimony could be admitted at trial. Lewis now contends his constitutional rights to confront his accuser and to a fair trial were denied. We disagree.

A. *The due diligence hearing*

Two law enforcement officers testified at the due diligence hearing. First, Officer Tanya Edquist testified she began attempting to locate L.M. in April 2017, about three months before trial. L.M. had a cell phone but it was taken from her

during the investigation, and the officer didn't know whether she had another phone. After having no success contacting L.M.'s probation officer, Officer Edquist went to L.M.'s home, where L.M.'s mother said L.M. was living in Texas with a boyfriend. L.M.'s mother was not in constant contact with her daughter but said she would give the officer's phone number to her. Officer Edquist continued to "run" L.M. for arrests and asked the Los Angeles Police Department South Bureau Human Trafficking Unit to keep an eye out for L.M. in "high prostitution" areas and to get an update on L.M.'s whereabouts from her mother.

Two days before the due diligence hearing, Officer Edquist talked to Houston Police Officer Mata, who had run L.M. under a FBI number and found her under the name Isis Wright. Under that name, L.M. had arrests in January, February, and June, and she had an address in Houston. A Houston police officer went to that address but the residents, as of the morning of the hearing, had not seen or heard from L.M.

The second officer who testified at the hearing, Officer Ruzanta Luledzhyan, was assigned to the South Bureau Human Trafficking Unit and had helped Officer Edquist try to find L.M. On June 29, 2017, L.M.'s mother told Officer Luledzhyan that L.M. was living with L.M.'s boyfriend's grandparents in Texas but the mother did not have an address. Mother also said the only way she was able to contact L.M. was through Facebook. However, L.M. was assaulted because of this case, and she was "in fear of coming out here." The officer followed up by calling mother and leaving a voicemail for her on July 6, 2017. Having received no call back, the officer called again on the 12th but this time a woman who spoke only Spanish answered, and the officer was unable to communicate with her. Although the officer went

to high prostitution areas in Los Angeles at least four times a month, she had not seen L.M. in those areas. The officer did not personally try to contact L.M. through Facebook.

Based on this testimony, defense counsel argued that the prosecution had failed to exercise due diligence because the officers had not tried to contact L.M. through Facebook. The trial court rejected the argument and found that failing to pursue all lines of inquiry does not establish a lack of due diligence. Also, the prosecution had no reason to believe that L.M. would flee or that she was afraid to return to Los Angeles. The trial court therefore declared L.M. to be unavailable and allowed her prior testimony to be read to the jury under Evidence Code section 1291.[3]

B. *The prosecution exercised due diligence to locate L.M.*

A criminal defendant has the constitutional right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15.) The right, however, is not absolute. (*People v. Herrera* (2010) 49 Cal.4th 613, 621.) Where the declarant is unavailable and where the defendant has had a prior opportunity to cross-examine the declarant, the declarant's testimonial statements are admissible. (*People v. Friend* (2009) 47 Cal.4th 1, 67; Evid. Code, § 1291.) Thus, under Evidence Code section 1291, subdivision (a), prior testimony is not rendered inadmissible by the hearsay rule if (1) "the declarant is

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[3] The day after the hearing, the prosecutor informed the trial court that Officer Edquist had called a number that possibly belonged to L.M. but the woman who answered was not L.M. Officer Edquist also found no advertisements using that number on "Backpage," a website used by commercial sex workers.

unavailable as a witness," and (2) the "party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."

A witness is unavailable when he or she is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) To establish reasonable or due diligence and unavailability, "the prosecution must show that its efforts to locate and produce a witness for trial were reasonable under the circumstances presented." (*People v. Herrera*, *supra*, 49 Cal.4th at p. 623.) "Considerations relevant to the due diligence inquiry 'include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored.' " (*Id.* at p. 622.)

On appeal, we " 'defer to the trial court's determination of the historical facts of what the prosecution did to locate an absent witness,' " and " 'independently review whether those efforts amount to reasonable diligence sufficient to sustain a finding of unavailability.' " (*People v. Thomas* (2011) 51 Cal.4th 449, 503.)

Applying this mixed standard of review, we conclude that the prosecution exercised reasonable diligence to find L.M. That is, the search for her began three months before trial and included attempts to contact her probation officer, to locate her in high prostitution areas, and searching for her in relevant databases. Officers also spoke to L.M.'s mother, who claimed to have no specific contact information for her daughter other than that she was in Texas and that she was on Facebook. Officers did

try to locate L.M. in Houston, but she had not been seen at the residence where she was reported to have been staying.

Lewis faults these extensive efforts as unreasonable. He first argues that the prosecution should have known L.M. was likely to disappear, given the transient nature of her lifestyle and that she had been beaten-up for talking to the police about Lewis. However, the prosecution is not required to keep tabs on material witnesses or to take protective measures to prevent a witness's disappearance, absent knowledge of a "substantial risk" the witness will flee. (*People v. Friend*, *supra*, 47 Cal.4th at p. 68; *People v. Wilson* (2005) 36 Cal.4th 309, 342.) The trial court found that there was no such "pre-knowledge" here. Indeed, L.M. had testified at the preliminary hearing, and although she said she had been attacked for talking to the police, she did not otherwise indicate she would be unavailable to testify at the future trial. It is also unclear—and Lewis does not specify—what controls the prosecution could have exercised over L.M., where, as here, it appears she disappeared long before the trial date was set and did not want to be found. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 676.) Although we do not intend to minimize L.M.'s circumstances, nothing in them significantly differentiates her from other witnesses who might have some reluctance to testify.

Second, Lewis argues that Officer Edquist tried only once to contact L.M.'s probation officer but should have made multiple attempts. However, the officer did not specify how many times she tried to contact L.M.'s probation officer but instead said she emailed and called the probation officer but could not get in touch with her. That she emailed *and* called the officer suggests at least two separate attempts to contact the probation officer. This,

considered with the officer's other efforts to locate L.M., was reasonable.

Third, Lewis faults the prosecution for focusing its search efforts in Los Angeles as opposed to Houston. The evidence described above details Officer Edquist's substantial efforts to locate L.M. in both places. Lewis nonetheless attacks the officer's efforts to find L.M. in Houston as too little, too late. He asserts that the officer waited until just three days before the due diligence hearing to try to find L.M. in Houston. That is not how we read the record. L.M.'s mother told Officer Edquist that L.M. was living in Texas. But Officer Edquist did not clearly say *when* she began efforts to find L.M. in Texas. What the officer did say was she had recently—several days before the due diligence hearing—obtained *specific* information that L.M., who was using an alias, had contact with law enforcement in Houston. The record thus suggests that the prosecution made efforts to find L.M. in Texas and those efforts did not yield results until days before the due diligence hearing. Therefore, the record belies Lewis's suggestion that the prosecution engaged in a lackadaisical and untimely search for the witness in Houston.

Next, Lewis argues that the prosecution should have tried to contact L.M. through her Facebook page. "[T]he Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry," no matter how unpromising. (*Hardy v. Cross* (2011) 565 U.S. 65, 71–72; *People v. Fuiava*, *supra*, 53 Cal.4th at p. 677.) Also, it is not clear that trying to contact L.M. through Facebook would have yielded more promising results. As the trial court observed, there were indications L.M. did not want to return to Los Angeles: she had no contact information, her cell phone was allegedly broken, she used an alias, and everyone law

enforcement contacted (her mother, grandmother, and Houston housemates) had no specific information about L.M.'s present whereabouts. From this, the trial court could conclude that the witness did not want to be found.

II. Sufficiency of the evidence that A.D. was a prostitute

Notwithstanding A.D.'s unambiguous testimony that she was a prostitute who exchanged money for sexual services, Lewis contends there is no evidence A.D. "engaged in sexual intercourse for money or other consideration" or that she "engaged in any lewd act between persons for money or other consideration" within the meaning of the pimping instruction, CALJIC No. 10.70.[4] The contention is meritless.

When determining whether evidence was sufficient to sustain a criminal conviction, " ' "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is

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[4] That instruction provides: "Every person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of that other person's prostitution, . . . is guilty of the crime of pimping in violation of . . . section 266h, subdivision (a). [¶] 'Prostitution' is engaging in sexual intercourse or any lewd act between persons for money or other consideration. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. The defendant knew that another person was a prostitute, and [¶] 2. That defendant lived or derived support or maintenance in whole or in part from the earnings or proceeds of the other person's prostitution, or from money loaned or advanced to or charged against that other person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed."

reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." ' " (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*Ibid.*) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction.]' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Here, there was more than sufficient evidence that Lewis was A.D.'s pimp. A pimp derives maintenance from the earnings of a prostitute. (§ 266h; *People v. Smith* (1955) 44 Cal.2d 77, 78.) "Prostitution is engaging in sexual intercourse or any lewd act between persons for money or other consideration." (CALJIC No. 10.70.) When the prosecutor asked A.D. if she "exchang[ed] money for sexual services," she answered, "Yes." She elaborated that she "[t]ypically" had sex with "Johns" on the Blade (areas where money is exchanged for sex). A.D. also said that she gave money she made to Lewis. Also, A.D. said that she worked a day and night shift for Lewis, who gave her condoms, transportation, and "protection." Moreover, L.M. and T.E., both of whom testified that Lewis was also their pimp, said that A.D. worked for Lewis.

Notwithstanding this clear, direct, and overwhelming evidence that Lewis was A.D.'s pimp, Lewis suggests we are in danger of engaging in the following "simpl[istic] syllogism": "[A.D.] said she was a prostitute; all prostitutes have intercourse for money; therefore [A.D.] had intercourse for money." We are in no such danger because this was the evidence: A.D. said she was a prostitute; A.D. explained that *she*—not all prostitutes

generically—exchanged sex for money; A.D. gave that money to Lewis in exchange for his so-called protection. Therefore, Lewis was A.D.'s pimp. The simplicity of the evidence in no way undermines the soundness of the jury's verdict.

III. Failure to instruct what is a lewd act

Next, Lewis contends that the trial court had a sua sponte duty to define for the jury "lewd act," a term used in CALJIC No. 10.70. That instruction told the jury that, to find Lewis guilty of pimping, he had to know A.D. was a prostitute and defined prostitution as "engaging in sexual intercourse or any lewd act." Lewd act was not otherwise defined. Lewis thus argues that the court should have amplified CALJIC No. 10.70 by further instructing the jury that a lewd act "means physical contact of the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification." (CALCRIM No. 1150.) We reject this argument. A trial court has a sua sponte duty to instruct on the general principles of law relevant to the issues raised by the evidence (*People v. Souza* (2012) 54 Cal.4th 90, 115) and to ensure the instructions provide a complete and accurate statement of the law (*People v. Fiu* (2008) 165 Cal.App.4th 360, 370). Once the trial court does so, it generally has no duty to give clarifying or amplifying instructions, absent a request and except where the terms used have a technical, meaning peculiar to the law. (*People v. Jennings* (2010) 50 Cal.4th 616, 670; *People v. Richie* (1994) 28 Cal.App.4th 1347, 1360.)

We need not decide whether lewd act is a technical term requiring elaboration, because under no standard of error is it conceivable that prejudice accrued to Lewis. The jury was

instructed that prostitution is "engaging in sexual intercourse *or* any lewd act between persons for money or other consideration." (CALJIC No. 10.70, italics added.) A.D. said she exchanged sexual services for money and that she "sold pussy." Thus, as the Attorney General notes, there was no evidence A.D. engaged in lewd acts not amounting to sexual intercourse in exchange for money under the definition of lewd acts in CALCRIM No. 1150. Stated otherwise, if A.D. engaged in sexual intercourse for money—and it is a more than reasonable inference that is what she meant when she said she "sold pussy"—then she engaged in a lewd act.

Nor is it conceivable that in the absence of a definition of lewd act the jury might have convicted Lewis of pimping for merely "offering sleazy companionship," as he suggests in his opening brief. Since prostitution in this case concerns what A.D. offered for money, not what Lewis offered, we decline Lewis's invitation to speculate on what he means by "sleazy companionship."

Because we conclude that any instructional error did not prejudice Lewis, we reject his related contention that his trial counsel provided ineffective assistance by failing to ask the trial court to define lewd act. (See generally *Strickland v. Washington* (1984) 466 U.S. 668 [ineffective assistance of counsel claim requires error and prejudice]; *People v. Scott* (1997) 15 Cal.4th 1188, 1211–1212.)

IV. *Romero*

Lewis contends that the trial court abused its discretion by denying his *Romero* motion. We disagree.

In the furtherance of justice, a trial court may strike or dismiss a prior conviction. (§ 1385, subd. (a); *Romero*, *supra*,

13 Cal.4th at p. 504.) When considering whether to strike a prior conviction, the factors a court considers are "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams (*1998) 17 Cal.4th 148, 161.)

We review a trial court's ruling on a *Romero* motion under the deferential abuse of discretion standard, which requires the defendant to show that the sentencing decision was irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 375, 378.) " 'It is not enough . . . that reasonable people might disagree about whether to strike [a] prior conviction. (*Id.* at p. 378.) The Three Strikes law "not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm . . . [T]he law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*Ibid.*) Only extraordinary circumstances justify finding that a career criminal is outside the Three Strikes law. (*Ibid.*) Therefore, "the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Ibid.*)

Here, Lewis argued that his two prior strikes should be stricken because they occurred in 2004 and 2005 and nobody was harmed. As to his current crimes, Lewis argued he did not recruit the victims into prostitution and therefore should not be subject to the same punishment as someone who "*introduced* much younger minors into a life of prostitution, or participation

in child pornography, where said minors had no proclivity for such actions before they were persuaded into engaging in them."

These arguments failed to persuade the trial court, which found that Lewis was not outside the spirit of the Three Strikes law. The court first cited Lewis's "extremely lengthy record and the circumstances of this case." That criminal record began when Lewis was a juvenile and continued into adulthood, with Lewis committing a criminal offense almost every year, from 1996 to 2004. In 2004, he was convicted of his first strike, robbery, and, in 2005, he was convicted of his second strike offense, attempted robbery. That Lewis was on probation when he committed the current offenses also factored into the court's decision. Given these factors, as well as the nature and circumstances of his present felonies, we cannot say that the court exceeded its considerable discretion not to strike the priors.

V. Trial court's use of CALJIC instructions

Lewis contends the trial court erred by using CALJIC instructions instead of CALCRIM instructions, over his trial counsel's objection. The Judicial Council of California adopted the CALCRIM instructions in 2006. (*People v. Thomas* (2007) 150 Cal.App.4th 461, 465.) Although trial courts are " 'strongly encouraged' " to use CALCRIM instructions, no "statute, rule of court, or case mandates" their use "to the exclusion of other valid instructions." (*Thomas*, at pp. 465–466; Cal. Rules of Court, rule 2.1050(e).)

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED

DHANIDINA, J.

We concur:

LAVIN, Acting P. J.

EGERTON, J.